

Military Whistleblower Reprisal and Mental Health Evaluation



IG Investigations





DoD IG

Military Reprisal Investigations

Mission:

- Investigate allegations of administrative improprieties in all areas of DoD programs and operations. Primary focus is allegations of reprisal under Whistleblower Statutes.
- Investigate and perform oversight on allegations of reprisal against military members, Defense contractor employees, and nonappropriated fund employees.
- Investigate or oversee allegations that military members were referred for MHEs without being afforded rights.

(Results reported to Congress in Semi-Annual Report)



Military Whistleblower “Protection”

IG has no authority to correct member's records.
Military members must apply to the Board for Correction of Naval Records for changes in their records.





Reprisal Statutes and DoD Directives

■ Whistleblower Reprisal

- Military Members
10 U.S.C. 1034, DoDD 7050.6, and IGDG 7050.6
- Nonappropriated Fund Employees
10 U.S.C. 1587 and DoDD 1401.3
- Defense Contractor Employees
10 U.S.C. 2409

■ Improper Mental Health Referrals

- Military Members
DoDD 6490.1 and DoDI 6490.4

Note: Appropriated Fund Employees: 5 U.S.C. 2302



Navy Implementation of DoD Directive

SECNAV INSTRUCTION 5370.7C

Subj: Military Whistleblower Protection

14 October 2005



10 USC 1034

**“MILITARY WHISTLEBLOWER
PROTECTION ACT”**



10 U.S.C. 1034



Prohibits the restriction of, or retaliatory personnel actions against, Members of the Armed Forces in making or preparing to make lawful communications to Members of Congress, Inspectors General, members of a DoD audit, inspection, investigation, or law enforcement organization, or any other person (including the chain of command) designated to receive such communications.



What Is Reprisal?

When a responsible management official takes (or threatens to take) an unfavorable personnel action or withholds (or threatens to withhold) a favorable personnel action from a service member because he/she made or was thought to have made a protected communication.



Receiving Whistleblower Reprisal Complaints





Who Can Accept Complaints within the Navy?

- NAVIG
- Echelon II IGs
- All others must refer reprisal complainants to DoD IG, Ech II IG, or NAVINSGEN



Two Step Process

- Preliminary Inquiry (complaint analysis)
 - Echelon II IGs only!
 - Timeliness of complaint
 - Decline investigation or investigate
- **Investigation**
 - Preponderance of the evidence

Both require the “acid test”



Preliminary — Receiving Reprisal Allegations



- Notify DoD IG within 10 days of receiving reprisal complaint (via Service IG)
- Use Service IG procedures to conduct preliminary inquiry (complaint analysis)



Preliminary - Timeliness Issue



“IG is not required to make an investigation . . . in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.”

Note: Do not, however, close a case just because the service member did not file within 60 days. You must first conduct a preliminary inquiry to determine if there is any evidence to support conducting an investigation.



Preliminary Inquiry

A Preliminary Inquiry is usually based on the interview with complainant and documents obtained from the personnel office.

- Normally do not interview responsible management officials and witnesses during initial stages of preliminary inquiry.
- Exception: If evidence overwhelmingly supports an independent basis for personnel action.



Preliminary Inquiry Analysis

- Establish detailed chronology
- Review complainant's testimony and evidence (from complainant and personnel office)
- Indicators that actions *may* have been in response to protected communications
 - "Failure to utilize chain of command"
 - "Going to outside agencies"
 - "I'm disappointed you did not first come to me"
 - "Chronic complainer"
 - "Files frivolous complaints"



The Four Reprisal Questions

■ ***Protected Communication?***

■ ***Unfavorable Personnel Action?***

■ ***Management Knowledge?***

■ ***Reprisal or Independent Basis for Action?***

Four questions also known as “acid test.”

Question One:



**Did the military member
make, prepare to
make, or was thought
to have made a
communication
protected by statute?**



Protected Communication

Any lawful communication made to:

- Members of Congress
- Inspectors General

*Note: Lawful communications to Congress and IGs do **not** have to disclose information concerning wrongdoing*



Protected Communication

Communications made to:

- DoD audit, inspection, investigation, or law enforcement agencies
- People or organizations designated under component regulations or established administrative procedures to receive such communications



Protected Communication

Communications to DoD audit, inspections, investigations, law enforcement, or Service chain of command protected only if they concern:

- Violations of law or regulation (includes EO issues)
- Gross mismanagement
- Abuse of authority
- Gross waste of funds or resources
- Substantial danger to public health or safety



Protected Communication

Protected communications may be:

- Verbal, written or electronic (phone, fax, E-mail)
- Communications made by a third party (spouse, relative or co-worker) on behalf of complainant
- Chain of command communications
May include complaints made during commander's call, request mast, or under open door policy. Articles 138 and 1150 are usually protected communications.



Protected Communication

Timing:

Actual date that the communication occurred (or believed to have occurred) is critical

- Date rumors started about complainant intending to make a protected communication
- Date complainant began preparing to make a protected communication
- Date the actual protected communication was made



Protected Communication

Remember: For each protected communication you must determine:

- To whom was it made?
- What was the protected communication?
- When was it made?



Protected Communication

What if...

- *No evidence of a protected communication?*
- *Allegation of wrongdoing was not substantiated?*
- *Protected communication was made in retaliation against management officials?*

Question Two:



**Was an unfavorable personnel action
taken
or threatened
or was a
favorable personnel action
withheld or threatened to be withheld
following the protected
communication?**



Personnel Action

What is an unfavorable personnel action?

**Any action that affects,
or has the potential to affect,
a Service member's position or
career.**



Personnel Action

- Fitness Report/Performance Evaluations
- Transfer or reassignment
- Changes to duties or responsibilities
- Disciplinary or other corrective actions
(Page 13, Article 15)
- Denial of reenlistment or separation
- Decisions about awards, promotions or training
- Decisions concerning pay or benefits
- Referrals for mental health evaluation



Personnel Actions that may not meet the criteria

- Investigations (fact finding tools) are not considered unfavorable actions

However, actions taken as a result of an investigation may be considered unfavorable action(s)

- Revocation of:

- access to classified material
- authorization to carry weapons
- flying status
- Personnel Reliability Program certification

Key: Was the action discretionary?



Personnel Action ?

What if...

- responsible official did not consider the personnel action to be "unfavorable?"
- personnel action was subsequently reversed?
- there was no personnel action?

Question Three:



**Before taking or threatening
an unfavorable personnel
action,
did the management officials
know about the
protected communication?**



Responsible Official's Knowledge

Two step process:

- Determine who is a responsible official
- Determine if each responsible official had prior knowledge of each protected communications



Who Is a Responsible Official?

Anyone who:

- Influenced or recommended the action be taken
- Made the decision to take the action
- Signed correspondence regarding the action
- Approved, reviewed, or endorsed the action



Responsible Official's Knowledge

What if...

- Responsible officials deny having any knowledge of the protected communications?
- No documentary evidence or corroborating witness testimony that the responsible officials knew?



DOUBT?

*If there is any doubt or uncertainty
whether responsible officials knew
about the protected communication --
give the complainant the
benefit of the doubt,
and proceed.*

Question Four:



**Does a preponderance of the evidence
establish that
the unfavorable personnel action
would have been taken absent
the protected communications?**



Making a Decision

- Reason for the action
- Reasonableness of the action (Was the action reasonable and appropriate for the offense?)
- Procedural correctness (Did RMO have the authority to take action and was action done in accordance with regulation?)
- Consistency of the action (Were previous problems handled in a similar manner?)
- Motive (Did RMO take the *right* action for the *right* reason?)

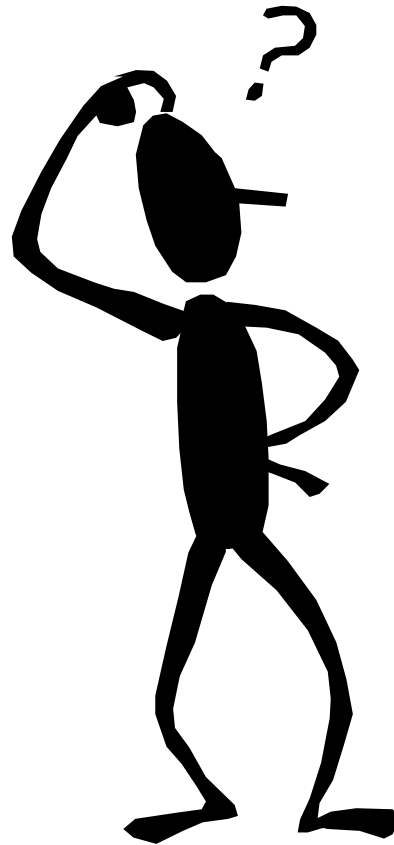


“The Decision”

- Reprisal
 - Preponderance of evidence supports reprisal

- Not Reprisal
 - Evidence supports independent basis for unfavorable personnel action

Mental Health Evaluations





MHE References

- DoD Directive [6490.1](#), “Mental Health Evaluations of Members of the Armed Forces,” October 1, 1997
- DoD Instruction [6490.4](#), “Requirements for Mental Health Evaluations of Members of the Armed Forces,” August 28, 1997

<http://www.dtic.mil/whs/directives>



MHEs Not Covered

**DoD Directive 6490.1 and
DoD Instruction 6490.4 do not cover:**

- ✓ Self-referrals
- ✓ Family Advocacy Program
- ✓ Drug/alcohol rehab programs
- ✓ Responsibility and competency inquiries
- ✓ Diagnostic referral by non-mental healthcare providers
- ✓ Evaluations required by Service regulations



Referral Types

- Non-emergency (routine)
- Emergency
 - Threatening imminently, by words or actions, to harm himself/others
 - Delay of MHE would further endanger service member (SM) or potential victims



Commander's Actions- Non-emergency MHE

- Authority to refer: **COMMANDER ONLY**
- Consults with mental healthcare provider (MHCP)
- Sends Commander of Medical Treatment Facility or clinic memo requesting MHE
- **AT LEAST 2 BUSINESS DAYS IN ADVANCE:** provides SM referral memorandum including statement of rights



Service Member's Rights

- Consult an attorney
- Request an IG investigation
- Seek second opinion (at own expense)
- No restrictions to communicate to IG, Member of Congress, attorney, or other person
- SM must have at least 2 business days, except in emergencies, to consult with an IG, attorney, chaplain, or other appropriate party



Commander's Actions Emergency MHEs

Commander's first priority is to protect SM and potential victims from harm

- Prior to referral, try to consult MHCP or other privileged healthcare provider
- Safely get SM to provider
- As soon as practical, provide SM a memorandum and statement of rights
- If unable to consult with MHCP before transporting SM, forward memo to MHCP as soon practical



Emergency Clinical Evaluation of SM

- Privileged, doctoral-level MHCP must make the clinical determination about whether SM is imminently dangerous
- Means SM is at substantial risk of committing act(s) or in near future resulting in:

serious personal injury or death to himself/herself, another person or persons, or destroying property likely to lead to serious personal injury, or death



Emergency Clinical Evaluation of SM

- Attorney at no cost to SM, if requested
- SM has right to contact relative, friend, chaplain, attorney, and/or an IG ASAP after admission
- SM evaluated **within 24 hours**
- **Within 72 hours**, privileged psychiatrist, or other medical officer, reviews factors leading to involuntary admission and appropriateness of continued involuntary hospitalization. Examines SM
- Notifies SM of right to legal representation



Emergency Clinical Evaluation

- MHCP's advise SM's Commander on:
 - Member's fitness and suitability for continued service
 - Whether separation from service is recommended
- Commanders who decline MHCP recommendation for separation of SM must explain decision to *their own* Commander within 2 business days



Military Whistleblower Reprisal and Mental Health Evaluation

Questions??



Contact Information

Primary Point of Contact:

Sue Fowler

Hotlines Division

(202) 433- 2097

Gary Morgan

Senior Official Investigator

(202) 433-4599